UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FINANCIAL GUARANTY INSURANCE COMPANY,

Plaintiff,

v. 12 CV 7372 (RWS)

THE PUTNAM ADVISORY COMPANY, LLC,

Defendant.

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New York, N.Y.
November 14, 2018
12:12 p.m.

Before:

HON. ROBERT W. SWEET

District Judge

APPEARANCES

SELENDY & GAY PLLC
Attorneys for Plaintiff
BY: SEAN P. BALDWIN
WILLIAM RATHGEBER

MILBANK, TWEED, HADLEY & MCCLOY, LLP
Attorneys for Defendant
BY: THOMAS A. ARENA
SEAN M.MURPHY
SAMANTHA A. LOVIN
ALLISON S. MARKOWITZ

(Case called)

MR. BALDWIN: What I have -- I assume you will only likely hear from me once, your Honor, so I'd like to address both Putnam's summary judgment motion and our motion in the same motion.

Does that make sense to you?

THE COURT: That's all right. Sure.

MR. BALDWIN: So just like to begin, Putnam's summary judgment motion is totally inappropriate because every element of FGIC's claims is supported by extensive evidence which Putnam disputes or purports to dispute. Every page of Putnam's briefs is devoted to arguments about the weight of the evidence. Putnam can't get summary judgment by weighing the evidence. It's the jury's job to resolve those disputes.

And, in fact, this is where our motion comes in. The evidence supporting FGIC's negligence claims based on the target portfolios sent to FGIC in the Peach Colored Spreadsheet, or the PCS, into the rating agencies in the rating agency portfolios is so strong that it really is not genuinely disputable.

So, if anything, summary judgment should be granted to FGIC on those claims leaving the remaining claims to be resolved at trial. But, at a minimum, Putnam is not entitled to summary judgment on any claims.

I'll begin with the collateral selection claims which

were the heart of the case before discovery when we discovered there were actually misrepresentations about the content of the portfolio as well.

Putnam's duty and what it represented it would do to investors and to FGIC was to select the Pyxis collateral in the interests of all investors. It was the collateral manager. Putnam concedes in its opposition brief that the job of a collateral manager was to select a portfolio that met the agreed-upon portfolio constraints for all of the participants in the transaction, to use its judgment and expertise to select the collateral of interests of all participants, including FGIC. Putnam told FGIC it was pleased to have an investor like FGIC as its client.

And Magnetar, the equity investor, the principal equity investor in FGIC, believed itself that the collateral manager had what it called fiduciary duties to the participants in the transaction.

Jim Prusko of Magnetar said, he testified it was Magnetar's view that the manager of a deal has duties to all the liability holders in the deal.

But Putnam didn't comply with those duties. It focused solely on the equity investors' interests in selecting the Pyxis portfolio. It treated Pyxis as a separate account mandate for the benefit of the equity investors. And those aren't my words. That's the equity investors' own words which

I'll get to in a moment.

The equity investors made their collateral preferences quite clear to Putnam before hiring it. They said to Putnam that they were pursuing a long-short correlation trading strategy, which meant they wanted the portfolio to be highly correlated with their short positions; otherwise, it was a risk they could lose on both their short and long positions.

The equity investors' short positions were against post-2005H1 or first half of '05 subprime RMBS related Baa2 or lower. So they were the assets the equity investors wanted in Pyxis. They wanted to exclude prime and pre-2005H2 RMBS and assets rated above Baa2.

But they wanted more than correlation. Correlation was a hedge for them. If the portfolio performed well, they would make money on their equity. But if it performed badly, they would make materially more money on their short investments for the simple reason they had a lot more short investments.

The evidence is undisputed that Magnetar -- Magnetar's own counsel has provided us with the evidence which Putnam says is inadmissible, but we will provide it at trial, we will provide the actual evidence from Magnetar if Putnam continues to insist on it -- that Magnetar's investment -- short investments in Pyxis were four times its long investments. So Magnetar stood to do best out of Pyxis if Pyxis failed.

And Putnam knew that. Putnam knew very well what Magnetar's plan was. It was to buy a portfolio that was essentially likely to fail. But if it didn't fail, then it would at least be hedged because the portfolio would be highly correlated.

So, how do I know Putnam knew that?

Exhibit D of the large book I showed you contains an e-mail that Putnam's -- sorry, that Michael Henriques, one of the equity investors who was at Deutsche Bank at the time of the deal and then after the deal closed he went to Magnetar, joined Jim Prusko.

In July, 2007, he sent an e-mail to Carl Bell, the head guy from Putnam, on Pyxis. The market is crashing or starting to crash and Pyxis is starting to suffer serious losses. He says to Bell, "These are fun days, eh?" And proposes dinner. Bell replies, "Sure. Going to bring your money bags?"

August 2007 Rob Bloemker from Putnam. This is Exhibit E. He writes to Prusko from Magnetar and he says, "Are you enjoying this market?"

Prusko replies, "Making truckloads of loot like u read about."

Putnam knew exactly what Magnetar's strategy was and that it benefited from more losses.

So, Putnam treated -- Putnam helped Magnetar and

Deutsche Bank do exactly what they wanted. It treated Pyxis as a structured separate account mandate for the equity investors.

Again, those aren't my words. If you look at Exhibit G, you will see on the first e-mail at the top of the first page it says in the second line, it reinforces that this is not just sponsor -- sorry. I'm actually looking at the wrong one. I apologize.

If you look at Exhibit F. This is March 27, 2006 when Putnam is being hired by Magnetar to manage Pyxis. And Deutsche Bank's, Michael Henriques, later Magnetar, says Putnam, in the third paragraph, is open to this type of deal since they view it more as a highly structured separate account mandate for the equity investor, Magnetar.

Pyxis was sold as a CDO. Not a highly structured separate account mandate for the equity investor.

July 27. Exhibit G. July 27 of the same year. Henriques is discussing another constellation CDR, Carina. And he's talking about how Prusko has said to the manager that he wants a certain kind of asset to be precleared with him.

And Henriques says, "I agree that Jim's e-mail is going to sound wacky to the CDO group's ears, but I think it reinforces that this is not just sponsoring a CDO but really a highly structured separate account mandate. I think DB and SSGA..." SSGA is State Street, the manager on the deal "...may be bothered by that, but that's the nature of the arrangement

and with the other deals we definitely have better interaction." One of those other deals was Pyxis. We definitely have better interaction with Putnam. State Street might be bothered by it, but Putnam was fine with it.

Exhibit H. November 2006. After Pyxis is closed. Putnam is doing -- sorry. Magnetar is doing another deal on Orion 2 with another manager, NIB.

And Michael Henriques, again, says, in the first e-mail, the last lines of the -- sorry, the second e-mail on the third page. "These deals are not CDOs, but they are structured separate accounts. I think Putnam got it. NIB doesn't."

What he was doing there was complaining about a number of things that NIB was doing that he didn't like and that Prusko didn't like.

He was saying in particular, among other things, that NIB was not buying newer bonds.

And Calyon explained to him -- newer meaning new issue bonds. What Calyon explained to him was that NIB feel very strongly -- this is in Alex Rekeda's response to e-mail, saying, "NIB feel very strongly that the older vintage bonds that they have in the portfolio have by far superior credit characteristics compared to the bonds they can pick up in the market now."

Henriques testified at his deposition that he believed

NIB believed bonds that were just six months older had by far superior credit characteristics. But he didn't want those in the deal. He wanted NIB to go ahead and buy new issues. He replied that NIB responses were unacceptable and don't reflect the spirit of partnership that's appropriate for a separate account mandate. He said, "I feel like we're being treated like a typical third party CDO investor but we directly engaged NIB and paid them $5.5 million a year in fees."So it couldn't be clearer. Putnam was hired and paid by the equity investors and as a result was expected to do their bidding and that's what Putnam did.

Putnam gave the equity investors the right to veto Putnam's collateral selections. It provided the equity investors with a daily trade lock for Pyxis. No other investor got that. The equity investors did. Putnam -- Prusko was going through the log everyday to see what was in there; and if he had a problem with it, the understanding was he would tell Putnam about it.

Putnam also provided the equity investors with an updated target portfolio it prepared with Calyon on August 29, 2006. It provided it to the equity investors on September 5 and it asked for their approval of it.

This updated target portfolio is critical. It's the document that Putnam relies on to say that FGIC should have known this deal was totally different from what it understood

from the PC years. In fact, FGIC never got it before it committed to the deal. It went to the equity investors. And the equity investors were asked to approve it, and it substantially reduced the amount of prime RMBS and assets rated above Baa2 in the portfolio from the amounts disclosed in all prior target portfolios, and it asked the equity investors to approve it.

And the equity investors and Putnam understood that the equity investors would walk away from the deal if Putnam bought assets they didn't like.

And this is perhaps the most significant testimony in the whole case. If you look at Exhibit I, this is the testimony again of Mr. Henriques. On page 78 of his deposition. He said, he was asked: Was it appropriate for an equity investor to have the right to object to or veto any of the assets going into a CDO warehouse prior to closing if they didn't have the risk of loss on the warehouse?

He answered: I think the form of objection it would have been appropriate was to say I'm buying equity in the transaction and if it has these assets in it I won't buy equity in the transaction. It's up to the manager whether or not they want to do it at that point. In other words, my way or the highway.

Later on, he said: I do remember cases where the manager had a different view, like NIB and in Orion 2, and we

just didn't buy the equity.

And then he was asked: Do you believe Putnam understood with respect to Pyxis that if they bought assets that you didn't like for the warehouse you wouldn't buy the equity?

And he answered they: Probably understood, yes.

They understood because he had discussed it with them. The whole arrangement was that Magnetar would control and Deutsche Bank, but primarily Magnetar, would control the collateral selection.

And the result of this was that there weren't many disputes between the equity investors and Putnam. The reason for that was that the equity -- that Putnam knew exactly what the equity investors want. They told them they didn't want seasoned assets, they didn't want prime, and they didn't want higher-rated assets. So Putnam didn't select those. It complied with these undisclosed portfolio constraints.

There were undisclosed constraints. Putnam makes a big point of the fact that the portfolio constraints -- the disclosed ones were complied with. What's critical here is there were undisclosed categories of assets that were excluded. And they were the good quality assets that the debt investors, particularly FGIC, were most interested in.

Putnam excluded prime RMBS and pre-2005H2 RMBS from Pyxis. He put some pre-2005H2 in there, but not until months

after Pyxis closed, and less than half of what it had told FGIC. And it drastically limited the volume of assets rated above Baa2.

And Putnam says it did so based on its own judgment. But if that's the case, why did every single target portfolio Putnam showed investors contain material amounts of prime RMBS, seasoned RMBS, and materially more assets rated above Baa2 than the actual portfolio?

Putnam obviously understood it was critical to get a balanced portfolio that met the interests of and wishes of all of the investors, including FGIC; that those sort of assets had to have some representation; there had to be some diversification in the portfolio. In fact, there was virtually none because the equity investors didn't want it.

Putnam also excluded CDOs that were backed by higher quality assets. Putnam included a disproportionate share of mezzanine bonds issued by Constellation CDOs, Jim Prusko's Magnetar CDOs, helping Magnetar to offload these bonds in a difficult market. And these bonds performed materially worse than comparable mezzanine CDO bonds. And we've got evidence of that. We've laid it out in the briefs.

Putnam also included a large amount of the ABX index and the subprime RMBS index and its component securities in Pyxis. These were exactly the assets that Magnetar was shorting in huge amounts, Baa2 and lower-rated RMBS, subprime,

unseasoned. And those were the assets that, at Magnetar's insistence, Putnam put into the deal in large quantities. And it didn't just put some of their index in; it put a lot in. And it put the components securities of the ABX index in there.

So although it technically didn't violate the limitation on the amount of the ABX index that could go in there, in fact there were three times the amount of ABX index or its component securities in the portfolio than the indenture contemplated.

And that's all fine because that was disclosed, as Putnam keeps on saying, that was disclosed in the portfolio. What wasn't disclosed was that Putnam didn't like half of the assets in the ABX index.

Putnam's own Carl Bell said we don't like -- we like half of this. We don't like the other half. John Van Tassel said the same thing.

Putnam says well but we shorted out of the deal. We bought protection on some of those assets that we didn't like.

That's true. They bought it on some. They didn't buy it on all of the assets they didn't like. There were tens of millions of dollars of investments in Pyxis that Putnam specifically did not like, said it didn't like. The only reason they were there was that they were the assets Magnetar was shorting and it wanted its portfolio to be correlated to those. They were also the highest risk assets in the portfolio

and those were the ones that were most likely to cause it to crater as they did.

None of this makes sense if Putnam was exercising its own judgment. It only made sense if Putnam was doing what the equity investors wanted and it complied exactly with their preferences.

Why did Putnam agree? Putnam says it just doesn't make any sense. It makes perfect sense.

They knew, as I just explained, as I just showed, the equity investors wouldn't buy the equity if Putnam did not select a portfolio that met their requirements. Putnam knew that if the equity investors didn't buy the equity, Pyxis wouldn't close and Putnam would lose millions of dollars in fees on Pyxis, would lose out on four to five more Constellation CDOs that had been promised to it.

That's exactly what was written down in a draft agreement right at the beginning of this whole deal. Putnam was going to get four to five more CDOs from Magnetar. That was its understanding in March.

And it would be forced, instead of doing these Constellation CDOs, to do typical CDOs, which were much harder to do because you had to do more work, you didn't have an equity investor that was sponsoring or guaranteeing that someone would buy at the highest risk. You had to go out there and find the assets yourself and find if investors yourself.

It would require greater risk because there was a high likelihood it wouldn't close if you couldn't find equity investors.

And it would be smaller fees than Constellation CDOs.

And all of this is laid out, again, in Michael Enrique's e-mail of November 2006, Exhibit H.

He actually says that, "I don't think there are any other investors offering a hundred percent sponsorship of $1.5 billion mezzanine deals." That's what Magnetar was doing. He testified at his deposition that although the manager's fees for Constellation CDOs were lower as a percentage of the assets than the non-Magnetar CDOs, they were higher overall because Constellation CDOs were four times as big as typical CDOs.

He said that the velocity of non-Magnetar CDOs is much lower.

And basically he said the non-Magnetar CDOs, managers had to scrap for everything. High risk it wouldn't work, and they had to work a lot harder for lower fees.

That's why they did this. That's why they did Magnetar's bidding.

Now FGIC reasonably, obviously reasonably relied on Putnam's judgment and expertise in insuring Pyxis. Carl Bell admitted that FGIC had never done a deal like Pyxis before. This is a very important document too, Exhibit L.

In the middle of August, 2006 FGIC actually decided it

didn't want to do Pyxis. Even with the data and the PCS it was still reluctant to do it because it felt like this was still too concentrated a subprime risk.

And at that point it admitted -- sorry. Carl Bell wrote an e-mail internally, which is Exhibit L, which said that FGIC has never been involved in a deal like this before. They chose the deal with Putnam as a test case. When they finished their work on the collateral concentrated subprime risk. They wanted 40 percent subordination. Calyon wouldn't offer more than 35 percent at that point. Eventually Calyon raised it to 40 percent. That's why FGIC did the deal. And they also offered an extra premium. But essentially FGIC was going to pull the deal if they didn't get 40 percent, and that was with the PCS data, assuming that was the portfolio.

So, it was critical to FGIC that all the higher quality assets that were in the PCS be actually in the portfolio. And FGIC had to rely on Putnam's judgment in selecting the collateral because the portfolio wasn't fully ramped before closing. And it was never going to be fully ramped before closing.

The offering materials said the portfolio would only be 85 percent fully ramped and in the end it was 91 percent. But there was no way for FGIC to know exactly what the final portfolio looked like before it closed. That was the nature of these deals. They were all done based on target portfolios and

the integrity of the offering of the collateral manager. And Putnam also had the discretion after closing to change up to five percent of the portfolio a year at its discretion. That's the reinvestment period for five years.

So even after closing FGIC still had to rely on Putnam's good faith and exercise of its own judgment and expertise because it could be changing up to 25 percent of the portfolio over five years.

And Putnam also had more expertise than FGIC in selecting assets for a CDO likes Pyxis, both because it had much more sophisticated technology, and it had a trading desk which gave it access to much more market information than FGIC.

FGIC was operating at the AAA, which was supposed to be risk-free level of the market. It was relying on managers like Putnam and their expertise to ensure that those risks were, indeed, AAA.

And it did its sense of due diligence on Putnam, recorded -- reflected in the record and reflected in the credit application to ensure Putnam had the necessary expertise. It met with Putnam in person. It met with -- it had conversations with Putnam on the phone. That's where the PCS came from.

And FGIC obtained target portfolios, the PCS, and performed its own analysis of both the ramped and target assets to crosscheck Putnam's work.

So the evidence strongly support FGIC's claim that

Putnam misrepresented it would select the Pyxis collateral using its own judgment in the interests of all participants and that, in fact, Putnam complied with the equity investors' undisclosed collateral preferences. But Putnam did more than that. Putnam knew -- and that's the collateral selection misrepresentation.

And here's the target portfolio misrepresentations. Putnam knew that if the debt investors and FGIC knew what was actually going to be in this portfolio, totally subprime virtually all Baa2 or less, and totally unseasoned, or virtually totally unseasoned, then they would not participate. That would just be too risky. It would be a totally undiversified, highly risky subprime deal.

So Putnam lied about what would be in the portfolio. It misrepresented how many higher quality assets the portfolio would contain.

And it did it -- if you look on page nine, slide nine, you'll see every single one of the target portfolios, every one, including the September 8 one that FGIC -- that Putnam claims should have alerted FGIC to problems here. Every one of them stated that there would be more higher quality assets in the deal than, in fact, were in there.

And there's a very clear pattern as to how these misrepresentations were made. Initially, just at marketing period, the initial marketing period, there were three target

portfolios sent in July and August, each of which -- one of them is the same one resent, but each of which said four percent prime, focus on seasoned product, 19 percent above Baa2.

Then FGIC gets into serious due diligence in discussions with Putnam, talks through all of the problems it has with the portfolio as it looks right now and what it wants to see in there, focuses specifically on prime, seasoned and higher than Baa2. And all of a sudden -- and asks for a target portfolio. And now the August 8 PCS says there will be 10.63 percent prime, 4.8 percent subprime -- pre-2005H2, and almost 29 percent above Baa2.

And then the rating agency portfolio, sent just three days later, which Putnam reviewed and called "our portfolio," said 10.4 percent prime in Fitch and 7.5 in S&P and nothing in Moody's because Moody's had a different threshold for prime. And then the only one of them that talked about the pre-2005H2 was Moody's. It actually said 5.1 percent pre-2005H2. And then the two that rated -- that had Moody's ratings said 20 percent Moody's ratings.

Then FGIC commits to the Pyxis guarantee. Putnam admits in its reply brief that FGIC committed to the Pyxis guaranty on September 6.

Suddenly, September 8, FGIC gets a term sheet that says 2 percent prime and 20 percent above Baa2. And I'll

explain why that's totally irrelevant because FGIC, one, had already committed and got it under terms where it was never going to understand what it was. And then, September 15, it was contradicted by the Fitch presale report, which Putnam reviewed, which said 10.4 percent prime and 20 percent Baa2 or more.

The actual portfolio at closing in October 2006 contained no prime, no assets below pre2005H2 and no -- and only 12.2 percent -- not 29 percent, not even 20 percent -- 12.2 percent assets rated above Baa2.

And when it was fully ramped it still contained no prime, just 2.3 percent pre-2005H2 and fifteen-and-a-half percent above Baa2. It was it was that materially different portfolio than had been represented to FGIC, to the rating agencies and to the rest of the investors.

These were not forward-looking statements, particularly the statements in the PCS and the rating agency portfolio. They weren't pie charts. They were actual lists of assets, both ramped and target assets. And they were representations of present fact that at that time Putnam had analyzed and selected but not yet acquired these assets for the portfolio. And all of these target portfolios were also actionable because at that time Putnam knew they were false.

It's not credible that Putnam believed the PCS and rating agency portfolios had all these higher quality assets in

them in mid-August 2006 and then suddenly, less than six weeks -- or six weeks later it had none of them. And it's especially not credible when their exclusion comported exactly with the equity investors' wishes.

Now, there are two sets of target portfolios, as I said, that we're specially focused on: The rating agency portfolios and the PCS.

We'll start with the rating agency portfolios because there is no genuinely undisputed facts about them. Frankly, I don't think about there are about the PCS but the rating agency is simple.

Putnam requested, reviewed, and commented on the rating agency portfolios. It knew exactly what was in them.

And if you look at Exhibit M, in the first page there, there's an e-mail there from a guy called Michael Malm, Mike Malm at Putnam. Mike Malm was the man at Putnam who was responsible for the RMBS that went into FGIC -- Pyxis, that was selected. He was the guy who actually selected that, worked for Carl Bell. And he's talking here with someone from Calyon about the S&P rating agency portfolio. And he says, "I see in the S&P file, something about the default rates. To confirm, are these the outputs based on our target portfolio?"

He knew this was the same portfolio that Putnam was using. This was Putnam's target portfolio.

The rating agencies -- he also knew, and Putnam knew

that these portfolios that the rating agency received were clearly false because they were obvious on their face. Putnam's own experts conceded that. And the rating agencies' portfolios, even more egregiously, were materially different from each other. The one that was sent to S&P, had the S&P ratings listed in there, not surprisingly, for each asset in the deal. And for each of the target assets it had the rating explicit. The Fitch pre-rating agency portfolio also had the S&P ratings listed. And they were totally different from the S&P ratings listed for the same assets in the S&P portfolio. Even the same data points for the same assets, they were different.

And then there were differences as to the classification of whether they were prime -- some of that was because Moody's had a different classification. Some of it was just random. There were differences in tranche sizes. There were differences in a whole lot of factors which are all laid out in the briefs.

Putnam had to see this because their own experts say it was obvious. But Putnam said nothing about it. Putnam didn't have a problem with the rating agencies using, obviously, totally inaccurate portfolios.

So, FGIC actually relied on these portfolios on their accuracy. And this obviously should go without saying. Any investor and any insurer on the senior tranche is going to rely

on the portfolios -- sorry, on the tranches that it's insuring having the required ratings. But here it was even more clear. It was a condition precedent to Pyxis closing. Pyxis couldn't close unless each of the notes had the -- and the tranche sizes, the notes were defined as tranche -- not just levels but also amounts, had the required ratings. If the AAA attachment point was wrong or any of the attachment points were wrong, that means the tranche sizes were wrong too. It meant there were assets in there that had different actual ratings to the stated ratings, all based on false rating agency portfolios.

So FGIC required, relied on the credit ratings to close because they were a condition precedent to closing. And the credit ratings were obviously based on the rating agency portfolios. Putnam doesn't dispute that. And FGIC relied on their accuracy as a result.

Now FGIC had to rely on the accuracy of those rating agency portfolios because it didn't have access to them. Only Putnam, Calyon and the rating agencies did. So FGIC had to rely on Putnam, the collateral manager responsible for collateral selection, with superior knowledge to everyone of the target assets to ensure their accuracy.

But, in fact, the rating agency portfolios were obviously materially false. And, again, despite Putnam's brief, there is no real dispute about this. FGIC's expert, his name is Fiachra O'Driscoll, he was the head of CDO -- the CDO

group at Credit Suisse at exactly this time for a number of years, including 2006. And what he did for a living was make sure that his deals had the right ratings. That -- the assets in his deals would obtain the ratings he required to close his deals. He knew this backwards, how to calculate the AAA attachment point based on the information then available to him. He even doesn't need a lot of information to be able to do that.

Putnam says he has to be able to run it through the model. That's not true. He may have to run it through the model to know exactly what the rating would have been, but what he can tell is how much more the rating would be based on certain characteristics. And in this case, based simply on one characteristic, which is the fact that the prime assets that were represented in the PCS were actually subprime assets and were, therefore, much higher correlated, much more highly correlated to the other subprime assets in the deal.

It necessarily follows that the AAA attachment point would have been 4.62 percent higher, at least, than the rating agencies set it at, which means that the deal -- one of the conditions precedent for the deal would not have closed -- I'm sorry, for the deal to close would not have been met.

And Putnam says, recognizing how damaging this testimony is, that this opinion is inadmissible because O'Driscoll didn't disclose his analysis.

That's simply not true. On May 7 of this year O'Driscoll explained his reasoning in his rebuttal report. June 26, a week, nearly six weeks later, O'Driscoll further explained his reasoning, over six pages of depositions to Mr. Arena, and he explained he had done some written calculations. Mr. Arena said I want to see those written calculations -- no. Actually what he said was he complained that they weren't produced and said -- and I said: Well, we'll produce them if you want. They're not going to make any difference. The reasoning is all in there, but you can look at them. They're just his explanation of how he got to those numbers. It's just his working of the numbers.

Putnam said not only they didn't -- we didn't produce them -- within the discovery period, all of this happened within discovery. Putnam never said we want to take his expert -- we want to take his deposition again to find out how he came up with this. It knew how he came up with this. It's really simple.

And in opposition -- so Putnam's had this information about O'Driscoll's analysis for six months. It's had a chance to test it, to cross-examine him and has never asked to open or examine his deposition.

And in opposition to Putnam's summary judgment motion we submitted a declaration from Mr. O'Driscoll explaining it to the court. And Putnam still hasn't submitted a single thing

from its expert explaining what's wrong with Mr. O'Driscoll's analysis. Because there is nothing wrong. It's a really simple matter of math that follows from the fact that the correlation between subprime assets and all day or primary RMBS under the S&P model which is set forth in his report is .1. Different sectors. Whereas, the correlation between subprime RMBS and subprime RMBS is .3.

That difference alone accounts for the 4.62 difference in the AAA attachment point.

Then he actually says that's actually a conservative estimate because there are two other factors in the deal which he lays out in his declaration which would make it even higher.

So the deal couldn't have closed if the rating agencies had seen the actual portfolios, at least it couldn't have closed on the terms that it did. It was, therefore, material these mistakes.

And Putnam's expert doesn't mention -- sorry. Putnam's expert didn't mention these rating agency confirmations that Putnam relies on in his deposition. He never mentioned them. For the first time, on summary judgment, we heard about those from Putnam. Putnam suddenly found the fact in that in February of 2007 the rating agencies had confirmed their ratings.

The deal was finally fully ramped in January. It was audited and sent to the rating agencies at the beginning of

February. And a couple days later they issue what are obviously pro forma confirmations of their ratings that have not been based on a rereview of the actual portfolio that was fully ramped but rather just redoing -- rather what they had done previously?

How do we know that? Putnam says it's incredible. We're accusing the rating agency of lying and not doing their job. Yes, we are. We are accusing the rating agencies of exactly what the FCIC accused them of and the SEC.

And if you turn to the Exhibit Q you will see that this happened all the time. That's the SEC report. Issues identified. And the Commission starts examinations of select credit rating agencies. On page 2, top bullet says, "the surveillance processes used by the rating agencies appear to have been less robust than the processes used for initial ratings."

If you then turn to page 21, you'll see there's a bullet in the middle of the page, "Resources appear to have impacted the timeliness of surveillance efforts." The first sub-bullet says, "In an internal email at one firm, an analytical manager in the structured finance surveillance group noted: 'I think the history has been to only rereview a deal under new assumptions/criteria..." new assumptions includes, obviously, a different portfolio "...when the deal is flagged for some performance reason.'"

As of February 2007 there was nothing -- FGIC hadn't started defaulting. There was no reason to believe, according to the rating agencies, that there was a need to go back and rereview it. So they never looked at the actual portfolio.

And how do we know that for sure? We know that for sure because, first, they issued their rating agency confirmations within a day or two of starting work on it. And they couldn't possibly have done the work. It took weeks and weeks to do the initial ratings based on the review of the actual portfolio. Had they reviewed -- sorry. Based on the rating agency portfolios. Had they reviewed the actual portfolio, they couldn't possibly have done it in two days.

They also made no comment. There were no communications with Putnam. Why does this portfolio look totally different from what we reviewed in August?

Again, the only explanation is they never looked at it, the actual portfolio.

And the most dispositive point, and that dispositive point, is Putnam still hasn't provided any expert support for its suggestion that Mr. O'Driscoll's calculations, a simple matter of math based on a simple correlation factor, is wrong.

So, if the attachment point for Pyxis, the AAA attachment point had been just 5 percent higher, 4.62 percent higher, a condition precedent to closing wouldn't have been met and Pyxis wouldn't have closed on the terms. And we argue that

that means FGIC would have closed on twice the AAA attachment point that is supported by the evidence, by the credit application. It's also supported by the fact that the only other deal FGIC ever did that was like Pyxis, Ischus 3, which Putnam acknowledges was very similar to Pyxis, also closed at two times an actual AAA. The three deals that Putnam cites where FGIC closed at one times AAA are obviously different. One of them was entitled to close at seasoned RMBS, two-and-a-quarter years seasoned, that the manager had managed for some time. Obviously that's a different risk. And the two C-Bass CDOs that Putnam cites came before Carl Bell's e-mail. They came months before. Carl Bell's e-mail acknowledged that at that point in August FGIC had never done a deal like Pyxis before. So they clearly were not like Pyxis either. They were -- they composed RMBS service by the manager's own servicing subsidiary.

But in any case there is no need to resolve that question now because the only real question for the purpose of our motion is was -- were the rating agency portfolio misrepresentations material? The answer is clearly they were because they would have increased the natural AAA attachment point.

And on the PCS. Putnam says there no evidence it knew about the PCS. And that's clearly false too. Putnam had done due diligence meetings with FGIC right before the PCS was

issued. On August 7, the day that PCS was asked for, Putnam had a due diligence conference call with FGIC. And FGIC was asking in those meetings and that conference call about prime seasoned and higher quality assets, higher rated. Right after that meeting, that call on August 7 ended, Elizabeth Menhenett of FGIC, who was responsible for this deal, spoke to Carl Bell, still on the same call. That's what the testimony from Mr. Bell is. There was such a call. He just doesn't remember what was said. Elizabeth Menhenett remembers what was said because she wrote it down immediately afterwards.

She asked Bell for all of the details of the name sets bought versus ones that's likely but not yet bought yet.

And Bell said to her, he could have said well I'll just give you them because I'm the collateral manager, it's easy for me. Instead what he said is: Calyon is managing the warehouse process and Calyon has all these details. So he told her to go off to get it from Calyon. And she did.

Now he says there is no way he would have told her to go to Calyon for this because Putnam never shared a list of target assets with Calyon. He testified to that effect.

But Menhenett's e-mail was written directly after their conversation took place. And she obviously had a clear recollection of it. She had no reason to mischaracterize it. He, on the other hand, doesn't recall it or claims not to recall it.

And Putnam did share a list of target assets with Calyon because that's exactly what the rating agency portfolios were. The rating agency that -- the portfolios that Putnam described as our portfolio must have come from Putnam. Putnam reviewed them, said their our portfolios. They clearly came from Putnam.

So Putnam clearly knew that FGIC had received from Calyon the PCS or the information in the PCS because Putnam told it to do so. And Putnam also knew what was in the PCS.

And it says there is no evidence it knew what was in the PCS. There's a lot of circumstantial evidence. Putnam knew it was going to be sent because it told FGIC to get it from Calyon. Putnam knew Calyon couldn't be relied on and it had to double check all its work and had to monitor its communications with investors. Just a week before the PCS was sent it said to Calyon: I want to see all your communications with investors.

So it's not credible that Putnam didn't want to see what Calyon sent FGIC unless it knew what Calyon was sending FGIC.

And internal e-mails indicate that the Calyon team that prepared this PCS was specifically instructed to reach out to Putnam for help.

And Putnam says well there is no e-mail proving it. Who knows what they did? Maybe they called them and talked

through what was supposed to be in there. Maybe they had already disclosed it weeks before.

The evidence strongly suggests that Calyon understood the target portfolio information in the PCS reflected Putnam's views. Why? Because just a few days had later Putnam's -- sorry, Calyon sent Putnam the rating agency portfolios which were very similar to the PCS. If Putnam had thought there was something way wrong with the assets in the target portfolio it sent the rating agencies, it would never have sent them to Putnam unchallenged. It would have disguised them. If Calyon had been responsible for this fraud, it wouldn't have just said to Putnam here's our defective portfolio. And it certainly wouldn't have had -- it would have been very concerned that Putnam would is have said something wrong, you know, something is obviously wrong. In fact, Putnam said nothing was wrong. Putnam said it's our portfolio. And that was very similar, if not the same, as the PCS.

So the obvious inference is that Putnam did have input into the PCS and did have input into the rating agency portfolios and, therefore, knew they were false because the errors were obvious on their face.

But let's assume for the moment in that Putnam didn't know, didn't actually know what was in the PCS. At a minimum, it should have known. Putnam is the collateral manager. Putnam -- FGIC was Putnam's client. Putnam said so to FGIC.

FGIC asked Putnam for the information in the PCS and Putnam said get it from Calyon. Putnam knew how important the PCS was to FGIC. FGIC had just told it during due diligence how important it was that it get higher quality assets, prime, seasoned, higher rated.

Putnam knew Calyon was chronically unreliable. There's a whole laundry list of problems in our briefs. And all of its work in investor communications had to be closely monitored. And dispositively. A week after telling FGIC to get the target portfolio from Calyon, Putnam reviewed the rating agency portfolios which were also obviously incorrect.

So if it didn't already know what was in them, it must have -- it must have raised a huge red flag for Putnam. And it must have thought: Well what on earth did Calyon just sent FGIC. But Putnam never said anything to FGIC or Calyon about it. The obvious conclusion it actually knew it but at a minimum it should have known.

And the misrepresentations in the PCS, Putnam tries to play them down and say these things didn't matter. If you look at slide 20 you'll see the misrepresentations laid out. The PCS said 10.6 prime RMBS. There were actually none. It said 4.8 percent pre-2005H2. There was none in closing and 2.3 percent in fully ramped. Assets rated above Baa2 28.9 percent; actually 15.5 percent. And the WARF, the Weighted Average Rating Factor. Putnam admits that the WARF for the

actual portfolio was 504. The Weighted Average Rating Factor, according to Putnam's own expert, Professor Longstaff, was 450. That is a dramatically lower WARF; i.e., a dramatically lower risk. The PCS was obviously a less risky portfolio and that's the deal that FGIC relied on in evaluating Pyxis.

Now how do we know that? Bell said FGIC is wary of doing a deal with concentrated subprime risk. It will only attach at 40 percent based on that portfolio.

During due diligence FGIC asked for and obtained from Calyon and Putnam extensive information on the prime, seasoned and higher rated assets in Pyxis. Right from the beginning it focused on the seasoning.

In Exhibit W you'll see FGIC asked Calyon to provide more information on the seasoning of the assets in the ramped portfolio.

If you look there at the top of the first page there, this is an e-mail to Putnam from Calyon saying that FGIC has just asked us, it says that: There is no information about the seasoning on Bloomberg of the assets in the target portfolio that FGIC had just received -- sorry, the ramped portfolio. This was just the 82 initially ramped assets. Didn't have seasoning information on Bloomberg. FGIC would like more details.

It wanted to know the seasoning. It mattered to it. It talked to Putnam about seasoning in its meetings. Putnam

said: Well there's all sorts of reasons why we don't want seasoned assets. The bottomline is they didn't want seasoned assets because they were not what the equity investors wanted.

And Putnam -- sorry. And then a week after receiving the PCS FGIC asked Calyon for a version of the PCS with more detail about the assets in it, the ramped and target assets. And Calyon provided it. And that's Exhibit Y. This is -- sorry, Exhibit X.

Calyon -- sorry. Putnam says: Well FGIC just took the PCS and never asked Calyon -- Putnam to confirm it.

FGIC asked Calyon to confirm it. Putnam had told it to get the information from Calyon. So FGIC asked Calyon a week later: Give us more information about these assets. And Calyon sends back exactly the same list of assets with a lot more information. Calyon gives them the same target portfolio that Putnam must have seen. And FGIC focused specifically on the primary RMBS in the PCS. It asked for and obtained from Calyon an updated spreadsheet that contained just the primary RMBS, that's Exhibit Y; again, with additional detail about these assets. And FGIC focused on the seasoned assets in the PCS. That's Exhibit Z. It had a communication with Calyon about the performance of seasoned assets. And FGIC's credit application explicitly confirmed its reliance. It said we are relying on these additional assets.

Now FGIC had to rely on the target portfolio. As I

said earlier, the portfolio wasn't fully ramped before closing. And it had to commit before pricing, as Putnam admits, which was weeks before closing.

So, FGIC asked Putnam for the list of the assets, the target assets which it had to rely on.

And then Putnam said not only was FGIC its client but go get the assets from Calyon. They can provide them.

And before asking for those assets FGIC made clear to Putnam just how important these -- the target assets were to it, the higher quality, in particular. And then it analyzed the PCS in detail, as reflected in its credit application.

So FGIC reasonably relied on the PCS essentially because Putnam told it to rely on the PCS. And it did its best to confirm it, confirm it with Calyon as Putnam had told it to do.

And Putnam says its reliance on the PCS was not reasonable because on September 8, 2006 FGIC received a pricing e-mail attaching a term sheet on page seven of which was a pie chart that showed the portfolio would contain just 2 percent prime RMBS. To begin with it also showed it contained 20 percent assets rated above Baa2 and the two percent prime was false.

But much more importantly, FGIC had already committed to Pyxis on September 6. It was no longer focused on the economics of the transaction, as Putnam knew, because it told

Putnam that. It was focused on the papering of the transaction and that's how it ended up getting this term sheet. And this term sheet is particularly telling about Putnam's real motivation here. Because this term sheet and this pie chart on the term sheet was based on a target portfolio that Putnam had discussed with Calyon a week before. Putnam had, actually on August 29, had a discussion with Calyon about what should be in the target portfolio. It should be dramatically less than was in the PCS of all the higher quality assets. And then the next day Ben Lee of Calyon sends Putnam a revised or updated target portfolio showing what Putnam had told it to show it.

But Putnam never sent that to FGIC or to the investors or to anyone else except for the equity investors on September 5, the day before FGIC committed to the deal. And what it sent it to them for was to get their approval of it. They approved it.

And then it still didn't go to FGIC until after FGIC approved the deal. Putnam knew FGIC was about to approve the deal. It waited until September 7 to release this target portfolio, updated target portfolio, which was still false. And it waited until September 7 to release it to the subordinate investors, not FGIC; and certainly not the rating agencies, who were never appraised of this updated target portfolio.

FGIC only got this updated target portfolio because

the pricing e-mail also attached the offering memorandum. And FGIC specifically asked Calyon for the draft offering memorandum so it could look at some language related to trades. That language -- sorry. That was then sent to FGIC as an attachment to the pricing e-mail. And the term sheet happened incidentally to be attached. FGIC had already reviewed two versions of the term sheet, which were identical to each other, and neither of which had a pie chart or a portfolio in it, a target portfolio; had no reason to think that this term sheet was any different from the others and nothing in the e-mail said it's any different.

So FGIC wasn't focused on it. It had already committed and it had no idea that this materially changed the whole portfolio profile.

So FGIC -- so Putnam -- and then a week later Putnam approved the Fitch presale report which showed 10.4 percent primary RMBS and 20 percent assets rated above Baa2 and so contradicted what it claims FGIC should have relied on in the term sheet.

The last thing I just want to talk briefly about is damages. FGIC's losses here were $782 million. That's what it was exposed to as a result of the Pyxis guarantee.

There is no dispute that if FGIC had not commuted its obligations it would have been obligated, beginning in 2016, to pay $728 million. Putnam's experts agree that that number is

accurate.

But Putnam says, while FGIC commuted it and therefore it only suffered $74.5 million. But then it contradicts itself.

In its opposition -- sorry, it's reply brief, Putnam agrees that what the commutation agreement did was mitigate FGIC's losses. The commutation agreement Putnam says was FGIC mitigating its losses and FGIC's commutation agreement was just an effort to mitigate its losses; in other words, FGIC's losses were not just the 74.5. That was the commutation or the mitigation of FGIC's losses.

The actual losses that were -- FGIC was guaranteeing to have to pay was 782 million. It sended up only paying 74.5. So we agree, obviously, its losses are capped at its out-of-pocket -- I mean its recovery, its damages are capped at its out-of-pocket commutation payment amount.

Now how much of that amount is FGIC entitled to? It's entitled to all of it for the simple reason that the Pyxis guaranty by its own terms could not be canceled, which means that every loss that Pyxis suffered under the Pyxis guaranty, every amount it had to pay under the guaranty necessarily followed from the misrepresentations that induced it to enter the guaranty. And this is fundamentally different from a standard case like a purchase of stock where the purchaser learns it's defrauded and then can offload its exposure by

selling the stock at whatever the stock can then recover and then it can get the difference from the fraudster.

FGIC couldn't offload its exposure under the Pyxis guaranty from the moment it signed it unless Calyon agreed to commute its obligations and then, obviously, the commutation payment would cap its losses.

And Putnam says well this would expose -- this would make Putnam effectively FGIC's insurer. That's not true. FGIC is only entitled to recover reasonably foreseeable losses under the Pyxis guaranty, as this Court held in the Primavera case. One of the most obviously reasonable foreseeable losses if you continue to hold on to an exposure is that the market will go down and you will end up losing money on it. So we agree there is a limitation. If Martians land on earth and that causes the value to go down or the exposure to be incurred that's not reasonably foreseeable. But if the housing market collapses and FGIC ends up having to pay on an irrevocable guaranty, that is obviously reasonably foreseeable.

Now, at FGIC -- Putnam cites to Ambac. We disclosed Ambac in our original brief. Ambac is distinguishable because there the defendants' representations, the Court expressly held each of the representations related to the loans in the transaction, not the transaction as a whole. The plaintiff could only recover losses on loans that breached those representations. Here, Putnam's representations related to the

transaction as a whole, related to the credit profile of the overall portfolio. The whole point of FGIC was that it wanted a diversified portfolio. It wanted higher quality as well as lower. It didn't matter what was what as long as there was enough diversification. It was a diversified portfolio that was represented.

And also the process was misrepresented by which the collateral was selected. That obviously relates to the whole transaction. So FGIC can recover losses on misrepresentations on the transaction as a whole.

Putnam can't take advantage of the commutation agreement to avoid liability. It says that even if it's found, this is Putnam's argument: Even if it's found to have fraudulently induced FGIC to agree to this irrevocable obligation that definitely caused it $74.5 million of actual out-of-pocket losses, Putnam doesn't have to pay any damages because FGIC commuted its obligation with Calyon.

But that's not -- that's exactly what the collateral source doctrine is designed to prevent. Putnam is seeking a windfall. Assuming it actually committed fraud, it says it doesn't have to pay anything.

The collateral source doctrine says if FGIC obtained relief or mitigation of its losses from a third party source, Calyon in this case, then it doesn't need -- sorry, then that doesn't get counted in Calyon's favor. The only limitation on

Calyon's -- sorry, in Putnam's favor. The only limitation in Putnam's favor is the out-of-pocket role. We only actually paid 74.5 million. That's the limit.

And then that really gives Putnam a massive benefit because under our expert's analysis the damages that were directly attributable were either the entire amount, 782 million, Putnam only has to pay 74, or at least 150 based on the higher attachment point which, again, is dramatically higher.

So Putnam is already getting the benefit of this settlement -- it's not a settlement, it's a termination, commutation. It's already getting the benefit. It just wants to wipe out its obligation altogether even if it's fraud.

And Putnam also ignores that the collateral source rule -- Putnam then says: Well, the collateral source rule doesn't apply and we can take advantage of the rule under New York law that it can reduce its liability by the amount of a settlement with a joint tortfeasor.

Calyon is not a joint tortfeasor. No one sued Calyon. Putnam hasn't alleged that Calyon was a joint tortfeasor. Putnam hasn't put forth any evidence that Calyon is a joint tortfeasor. All of the evidence that's before the Court indicates that Calyon was following Putnam's instructions. None of the evidence makes sense unless Calyon was doing what Putnam wanted.

So Putnam is the sole tortfeasor. So there is no reason to apportion liability between joint tortfeasors because there aren't two joint tortfeasors.

At a minimum, Putnam -- FGIC can show that it suffered substantial, proximately caused losses based on a higher attachment point or a worse performing portfolio. Either it can show that it would have, in fact, attached at twice the natural AAA attachment point or at 50 percent based on the PCS. In either case, it comes out 50 percent. That's $150 million less exposure it would have incurred under the Pyxis guaranty. That's at least the case.

If you take into account not just -- one thing Putnam tries to do is isolate each of these representations. If you take all three of them into account, if you take into account that Putnam misrepresented that it was going to select the collateral independently, using its own judgment, and the portfolio contained no prime, very little pre-2005H2 and just 15 percent above Baa2, and it only contained CDOs that likewise excluded those assets, and it contained large amounts of the ABX index and its constituents that Putnam didn't like, FGIC obviously either would not have done the deal at all or would have done it on materially different terms and probably materially higher than 50 percent attachment point. And so the damages would be substantially higher. That is a question of fact for the jury. We're not asking the Court to resolve that

question now. But the reality is that is going to be resolved by the jury and it could well be that the damages are higher than the losses -- the losses were higher than 150 million, capped at 74.5.

And then the last point that has been briefly mentioned in the case -- in the briefs is that this entire scheme of Magnetar's had a material impact on the financial crisis. It really -- Putnam says we say Putnam caused the financial crisis. Of course we don't say that. What we say is that Putnam played a role in the financial crisis by helping Magnetar implement its scheme. What Magnetar's scheme did was keep the housing market alive for a year longer. That's what FGIC's expert whose report is in evidence shows. It kept the housing market alive for a year longer than it would have otherwise.

At the time Magnetar started doing its CDOs, the market was starting to drop. If people didn't do CDOs, there was no one to buy RMBS. If no one bought RMBS, there was no one to buy mortgages. If no one was buying mortgages, mortgages wouldn't get issued to subprime borrowers and housing prices would have started to drop because they couldn't get mortgages and then the whole thing would have started to fall in June or early 2006.

Instead, Magnetar started a series of CDOs that kept the market propped up for another year during which housing

prices rose and the result was that when the collapse happened it happened -- it was far more severe than it would have been had it happened in early '06. And Putnam was an integral part of that scheme because Putnam was the first reputable manager to do or to agree to do a Magnetar CDO.

Once Putnam signed on, Magnetar wasn't just using fly-by-night guys who had only been around a few years. It was using managers who had been around a hundred years that had a real reputation and that knew -- and that the market relied on. So the market -- investors would invest and other managers would get onboard with other parts of the scheme. Putnam was to be -- helped Magnetar get this thing off the ground.

And so Putnam helped Magnetar do what exacerbated the financial crisis. And under FHFA v. Nomura which we cite in our briefs, the Second Circuit held that a defendant cannot hide behind a financial crisis that it helped to cause even if only to a tiny degree as an intervening, independent intervening cause of the plaintiffs' losses. And that's exactly what Putnam is trying to do here, saying we can't show how different this would have performed absent a financial crisis that sort of swamped everything. Putnam helped exacerbate that. Under Nomura -- and Nomura was based, by the way, on the Second Circuit's decision in this case. So, Putnam can't simply say there is a financial crisis and that's the problem. Putnam helped that. It didn't cause it alone,

obviously. It helped. And under Nomura that bars it from relying on it.

OK. I've taken enough of your time. Thank you very much.

MR. ARENA: Your Honor, Thomas Arena from Milbank for Putnam. Your Honor, I do have a PowerPoint and some exhibits. May I hand them up?

THE COURT: Sure.

MR. ARENA: Your Honor if it's acceptable to the Court I'd like to address issues relating to liability. My colleague, Mr. Murphy, would ask for an opportunity to address damages. I will try to be as absolutely telescoped and as streamlined as I can be, your Honor.

THE COURT: OK.

MR. ARENA: Your Honor, I'm not going to chase Mr. Baldwin's argument down every rabbit hole, every assertion of fact with which Putnam disagrees. Putnam has submitted a 56.1 statement, a 56.1 counterstatement that sets forth our view of the facts. It sets forth the support that we cite for each and every allegation, each and every factual assertion that we made.

My purpose today, your Honor, is to be as telescoped as I can because I think that there is a streamlined path to summary judgment on each of the alleged misrepresentations made by FGIC.

When I say a streamlined path, I'm underselling what I'm about to tell you because I think there are multiple streamlined, straightforward paths to summary judgment on each and every misrepresentation that they make.

So, your Honor, FGIC alleges at this point, it's now clear, three alleged misrepresentations. And these misrepresentations underpin each of their claims for fraud, for negligent misrepresentation and negligence.

Those three alleged misrepresentations, when you cut through all of the facts, when you cut through everything: One, that a spreadsheet called the Peach Colored Spreadsheet, sometimes referred to as the PCS, by its initials, that that was false; that was a spreadsheet that was sent by Calyon, the arranging bank for the transaction. Mr. Baldwin didn't talk a lot about Calyon. Calyon was the arranging bank. It structured the transaction. Putnam was just a collateral manager. Calyon sent the Peach Colored Spreadsheet target portfolio to FGIC. That's alleged misrepresentation number one. That target portfolio purportedly was false.

Two, target portfolios that were sent by Calyon, arranging bank, to the rating agencies -- they weren't sent by Putnam, spent by Calyon to the rating agencies, those were false.

And then third, there is an amorphous claim that Mr. Baldwin referred to it as the portfolio content

misrepresentation. But the suggestion is Putnam didn't select assets according to its own judgment and that's allegedly false.

FGIC's theories, each and every one, I submit to you is unprecedented. And I want to address them one at a time in as telescoped and as straightforward manner that I can, your Honor.

So let's take the Peach Colored Spreadsheet first. Let's be clear about what it is. It's a document that was prepared by Calyon. It contains two parts. Part one, a statement of historical fact, the 98 assets that had been selected as of that date for the ramped portfolio. That constitutes approximately 75 percent of the final portfolio. That information went to, was sent by Calyon to FGIC. FGIC got it. Here, fellows, here's three-quarters of the portfolio assets that we have ramped to date. And then there's a second part. There are about 50 assets. They're in peach shading, Judge. And those are represented to be target assets by Calyon for the yet-to-be ramped, remaining 25 percent of the portfolio.

What's this about? FGIC's claiming: Well, that target portfolio, when you consider the peach colored assets it indicated that there would be ten percent prime. It indicated that there would be a whopping 4.8 percent of the assets that were from 2005H1, not later. And it reflected that

28.8 percent would be rated above Baa2 by Moody's. And that misled us, according to FGIC.

I'm on page four of my outline, your Honor.

Point number one, the first streamline path to summary judgment: Putnam didn't make this representation. Putnam didn't -- there is zero evidence in the case. Putnam didn't prepare the PCS. It didn't send it to Calyon. There is no evidence Putnam even saw it.

This would be the first case in history, your Honor, where a Court held a defendant liable for a misrepresentation it didn't make and it never even saw it. Putnam didn't see this. There is no evidence in the record that Putnam ever saw it. No witness testified to that. There is no document to that effect. The e-mail by which Calyon sent the Peach Colored Spreadsheet to FGIC did not copy Putnam.

So the only way that FGIC can tie Putnam to this document is that it relies on the disputed testimony of a single witness, Ms. Menhenett, its lead underwriter, who said: Putnam told me to get the targeted assets for the remaining 25 percent of the portfolio from Calyon.

We don't agree with that, your Honor. But your Honor doesn't have to resolve this factual dispute. Because even if it were true that Putnam told Ms. Menhenett, "Get it from Calyon," there's still no evidence that Putnam knew what information Calyon had sent to FGIC. And they cite no cases

that a defendant can be liable for an alleged misrepresentation it didn't make and it didn't know existed.

So let me lead -- that leads to the second streamlined path for summary judgment in favor of Putnam as it relates to the PCS. There wasn't a misrepresentation. It's a target portfolio. The portion -- the portion that they're complaining about, it's a target. It's a forward-looking statement.

The cover e-mail, your Honor -- and this is in my binder that I handed up, if you flip to Arena Exhibit 16, that's the exhibit number that relates to the declaration that I submitted in support of Putnam's summary judgment motion. I have there the actual e-mail by which Calyon, not Putnam, forwarded the PCS to FGIC and we highlighted language. That's our highlighting. That's not part of the original document.

Mr. Anand of Calyon, "Just to highlight a few points, the assets highlighted in the peach color are the target assets we anticipate in the portfolio. They are not yet traded as indicated in the final. The rest of the assets are currently in the portfolio."

That's the 75 percent that had already been selected.

"I must also remind you that Alex Rekeda," of Calyon, not a Putnam employee, the senior Calyon banker on the deal, "has not yet checked over this pool. So please be aware that there might be some changes he may wish to make as the deal ramps up further."

Pretty clear. FGIC is being told the targeted assets are anticipated, not traded. They haven't been checked over by the senior Calyon banker and they are subject to change.

Under the law we cite the Duane Reade case but there is substantial authority on this point, Judge. This is well established law. For a forward-looking statement to be actionable, you have to show that the speaker held an opinion that the projected information -- that the speaker didn't believe that the projected information was true.

Here, the speaker is Calyon. It's not even Putnam. And there is no evidence that Putnam, even if it did know about these assets, these targeted assets, thought that they were false. So that's a second path to summary judgment for Putnam on this claim.

On the issue of Putnam's knowledge. FGIC's briefs, they cobble back and forth between willful blindness and actual knowledge. In their opening brief they talk quite a bit about willful blindness. We thought that Putnam was willfully blind to the falsity of the PCS.

Well, we pointed out: Willful blindness is pretty inapplicable. It's a very high standard. But, moreover, there is no authority that a claim that a forward-looking statement is false can be established by willful blindness. The cases suggest you need actual knowledge. So we point that out.

In their opposition brief, the reply brief, they say

we've got evidence of actual knowledge. No, they don't, Judge. There is no evidence that Putnam ever saw the PCS or knew what was in it.

They have a fallback claim. Their fallback claim is we have some e-mails by which Putnam found Calyon to be unreliable. You knew that Calyon was unreliable, Putnam, therefore, you really should have checked on what Calyon had sent to Ms. Menhenett when she asked you for the targeted assets for the remaining 25 percent of the deal.

I would submit that these e-mails, if anything, they show Putnam's diligence. But not a single one of those e-mails cited by FGIC relate in any way to a lack of confidence by Putnam as it relates to Calyon's preparation of target portfolios.

FGIC's briefs are replete with statements along the lines of Putnam must have known, Putnam must have known. That's not a basis, your Honor, to avoid summary judgment. They need to cite evidence.

There's a suggestion made by Mr. Baldwin that well we're not just complaining about the PCS. All of the target portfolios were false. And there were a number of them. Mr. Baldwin made the argument here that they were Putnam's target portfolios. In point of fact, they were Calyon's target portfolios. Every target portfolio was sent out by Calyon, not by Putnam. Put was copied on some of them, not the PCS, but

they were all prepared by and sent out by Calyon.

Now, to the extent that we want to talk about target portfolios and what FGIC knew or didn't know about whether they were forward-looking statements, your Honor, I would invite the Court's attention to the first exhibit tab in the binder, exhibit -- Arena Exhibit 12 which are excerpts from the investor presentation that was circulated by Calyon to potential investors. It's laden with cautionary disclosures, laden with disclaimers.

The disclosures, among other things, and we've highlighted some of them in the copy that we handed out, the target portfolio is described as an indicative asset type distribution. Among the forward-looking statements that it identifies are portfolio compositions. It discloses some important factors which could cause actual results or performance to differ materially from those expressed or implied in any forward-looking statements including the actual composition of a collateral.

Your Honor, think about it. Here's a list of targeted assets. You just don't go into the local Duane Reade and buy the targeted assets. You have to find a willing buyer. You have to find a price that works. There's a lot that goes into it. Its subject to market forces. And that's what these disclosures were telling potential participants in the deal such as FGIC. They all were being told that these were

forward-looking statements. And there were careful, specific disclaimers accompanying each of these target portfolios.

FGIC argues you never -- you had a duty to correct. We relied upon Putnam. We relied upon you. You had a duty to correct. And you never corrected. We dispute that Putnam had a duty to correct. We dispute that the target portfolios were false. We dispute that Putnam made any false representations in connection with the target portfolios. But, if Putnam had a duty to correct, it corrected.

September 5, 2006. So just to place this in context. The deal -- the first investor presentation goes out in early July. The PCS is sent by Calyon to FGIC on August 7. The deal closes in October of 2006, October 3. So between the PCS and before the closing, on September 5, one month after Calyon sent the PCS to FGIC, Putnam sent an updated target portfolio to Calyon with the following directions. And this, your Honor, is the third tab, tab 26, or Exhibit 26. And we've highlighted, your Honor, several things in this cover e-mail, and then I'll go to the excerpt of the attachment. The cover e-mail from Mr. Bell, who is the lead Putnam employee on this deal, he sends his e-mail to six Calyon recipients.

It's true, as Mr. Baldwin notes, he also adds Mr. Prusko of Magnetar and Mr. Henriques of Deutsche Bank. They were the equity sponsors of the deal. There's nothing unholy about that, your Honor. But Mr. Bell sends this e-mail

to six Calyon recipients. And he attaches the target portfolio. And here's what he says, first line, which I have highlighted, "We have updated the target portfolio based on our aggregation to date." So we've updated the target. "The revised portfolio is broadly consistent -- has been sent -- or has been shown to investors in the pitch book." That's the same document that's Arena Exhibit 12, the first document in this binder.

And then he writes, "We would like this target portfolio to be reflected in the term sheet provided to investors prior to pricing."

So that's Putnam sending an updated target portfolio to Calyon with the request that Calyon, which as part of its job, circulates this updated target portfolio to potential participants in the deal. That was Calyon's responsibility. There is no suggestion that it was Putnam's job to send out target portfolios. It didn't do that at all. That was Calyon as the arranger's responsibility.

Then, your Honor, if you look to the attachment -- and this is highlighted in a number of places -- but it shows two things that I think are relevant to this motion. One, what's the amount of prime assets in the updated target portfolio that Putnam wants Calyon to send to all participants in the deal? 1.25 percent. Not the 10 percent in the PCS that Putnam never saw. 1.25 percent.

The final -- the amount of prime assets in the final portfolio. It wasn't zero as FGIC suggests. The Pyxis indenture defined prime specifically to be RMBS that had an aggregate FICO store in excess of 675. That was the definition of prime. According to that definition, 1.82 percent of the final portfolio was prime.

Target says 1.25. Final portfolio. You did a little better if you like prime. You got 1.82.

What's the amount of assets in this target portfolio rated above Baa2 of Moody's?

I calculated, Judge -- my math is not perfect, but I calculated it to be 16 percent or 16.25 percent. Again, the final percentage in the final portfolio of 15.47.

That's what we're talking about, Judge. Where is the fraud? Where is the negligent misrepresentation? Where is the failure to correct something that wasn't even false to begin with? To the extent there was a duty to correct, it was corrected.

In their reply brief FGIC makes an incredible assertion. It's truly an incredible assertion. And I'm reading from their reply brief, page 11. On September 5 Carl Bell finally sent the updated target portfolio not to Calyon but to Jim Prusko of Magnetar and Michael Henriques of Deutsche Bank. That's a quote from their reply brief.

Judge, if you flip to the front page there are six

Calyon employees who received this e-mail. The notion that FGIC can claim that this was sent not to Calyon but to Magnetar and Henriques is mind-boggling. I've leave it at that.

I've got another path quite streamlined to summary judgment. Actual and reasonable reliance. FGIC cannot establish either.

In his presentation today FGIC's counsel made no mention of the fact that starting in February of 2007 after the deal closed FGIC received information from two sources, the FGIC trustee -- I'm sorry, the Pyxis trustee which was LaSalle Bank, a subsidiary of ABN AMRO, totally separate from Pyxis, totally separate from Putnam, totally separate from Calyon. They received trustee reports as to the actual composition of the final portfolio.

Two, they received access to a website maintained by Putnam for participants in the deal. Putnam maintained its own website where it produced month in, month out information about all of the collateral assets in the deal. And it gave FGIC access. It's not disputed. FGIC received the trustee reports. That's not disputed.

If I can invite your Honor to turn to the fourth tab in the binder, Arena Exhibit 10. This is the February 2007 trustee report sent to FGIC, being circulated by Frances Sexton of FGIC to Ms. Menhenett their lead underwriter on the Pyxis deal. Forty pages containing every conceivable fact about

every asset in the deal: How much was prime. How much was subprime. Year of issuance. Ratings. Amount above Baa2. Amount below Baa2. It was all there.

It was also in Putnam's website that Putnam maintain. Remember, Judge, the claim is Putnam is trying to pull the wool over everyone's eyes. Putnam is defrauding people. Putnam is making misrepresentations. Putnam has a duty to correct portfolios. They're hiding information.

Putnam is also maintaining a website to which it gives FGIC access and updates monthly reports, month in, month out, with all of the exact identity and information about all of the assets in the deal. And that, your Honor, is set forth in the fifth tab, Arena Exhibits 56 to 60.

And if you flip throw those, Judge, the last set of documents behind the last blue page are all the assets in the deal, including their rating, the amount, whether they're subprime, mid prime. It's all there. It's all there. It's all there. You didn't hear FGIC say anything about that during their argument today.

Why is that relevant? Well I think it's relevant for a number of reasons. It shows no intent to defraud. It shows that FGIC got relevant information. It shows that to the extent that there was a duty to correct, it was corrected.

But there's another reason. FGIC's counsel made reference to the fact that this deal allowed Putnam as

collateral manager to trade up to five percent of the collateral assets every year. FGIC had the right at any point, right, had the ability to pick up the phone and call Putnam. I want more prime. I'm upset that only 2.3 percent of the deal is from the first half of 2005. I'd like a slightly higher percentage consistent with the PCS of 4.8. Can you do that for me?

They never complained once. They received all this information. They never complained ever.

And, your Honor, I would refer the Court respectfully to your own decision in Granite Partners. Sophisticated parties, and FGIC was surely a sophisticated party, as I'll get to, are under a duty to make affirmative efforts to protect themselves from a misrepresentation and they can't be heard to complain when they don't make diligent inquiries.

FGIC had all this information. It never complained once, Judge. What does that tell you?

Let me briefly address this argument that FGIC was locked into the Pyxis guaranty on September 6. The suggestion was made during counsel's argument that we don't dispute that.

I don't really know what to make of that, your Honor. Here's what I would have to say. I remember in first year law school I learned that an executory contract that couldn't be performed within one year had to be in writing.

When did FGIC commit to the deal, according to their

argument? September 6. There is nothing special about September 6, 2006. That was the date of their internal credit application approval. That's all September 6 is, is the date that their credit committee said sure, go forward. They didn't sign any agreements on September 6. In fact, they didn't sign an agreement that committed them to the deal until October 3.

Why is it so important for FGIC to claim well we were committed by September 6? Because they want to absolve themselves of any responsibility of looking at subsequent target portfolios or information that they received after the closing. It won't fly, your Honor. It just won't fly.

As a matter of law, FGIC was not legally bound until October 3. And if they didn't like the final portfolio, which was 91 percent ramped at the time of closing, they could have raised their hand and said we're not participating; we thought the deal would be different. They never did so.

Now, I don't want to go off on a tangent, your Honor, but if FGIC's position is we were committed as of September 6, 2006. I really don't know what we're doing here and I say that because FGIC didn't file suit -- it was a long time ago but they didn't file suit until October 1 of 2012, more than six years after they say they were committed to the deal. So if that's really their position, I think they're time barred on all their claims.

Let me move on, Judge. I'm mindful of the time. Let

me try to move on and push forward.

Materiality. I told you that there were a number of -- a number of streamlined paths to summary judgment. I think materiality is one. FGIC picks and chooses which target portfolios they want to rely upon. They select -- they select a PCS which is August 7, 2006. But they received target portfolios before. They received target portfolios after that. They all had slightly different amounts of prime. They had slightly different amounts of assets rated above Baa2.

FGIC never drew anyone's attention to: Well, we really need to have this amount of prime. They don't rebut any of the cases cited by Putnam that such small differences, such small discrepancies are not material.

The fact that FGIC never commented on these varying amounts of prime or 2005H1 RMBS or assets rated above Baa2 we submit evidences the insignificance of these small variations.

I just want to speak a second about FGIC's duty. There's a lot of discussion about Putnam's duty. What was FGIC's duty?

Assume for the sake of argument that FGIC was committed to the deal as of September 6 as they argue. It was their decision to proceed with the transaction knowing that they didn't have access to the final portfolio. They made -- they were not babes in the woods. They were not infants. They made that decision. And where a party proceeds with a

transaction knowing it's not received full or complete information, it's reliance cannot be deemed reasonable or justifiable. That's the KNK case that we cite.

And as I noted, your Honor, not to belabor the point, Pyxis was not fully ramped until January 2007. FGIC had four months from October 2006 until the date it was fully ramped to ask Putnam to acquire different assets. And, as I noted even after the closing, Putnam had the ability to the trade up to five percent of the portfolio assets each year.

There were two occasions postclosing, your Honor, two occasions where FGIC in writing said the deal is performing as expected. The first is behind Arena Exhibit 45, that tab. This is a closing memo, signed by Ms. Menhenett, on October 30, where she affirms, "There were no material differences between the closed transaction and the transaction approved by the SEC."

FGIC argues well that was October 30. The deal still wasn't fully ramped. Give us a pass on that one. Fine.

Look at Arena 46. This is an amendment request form from April 2007. By this date FGIC has already received several iterations of the trustee reports showing all the assets in the deal. They've received access to Putnam's website showing all the assets in the deal. And we highlighted the language in which four FGIC representatives, including Ms. Menhenett, represents "the deal is performing as expected."

This amendment request form was prepared because at that point in time Putnam had a change in ownership. And it's owner, Marsh & McLennan, had sold it to a Canadian insurance company called Great West. As a consequence of that change in control of Putnam, FGIC was in a position where it had to consent to the change of control. And they did so. And they represented, "the deal is performing as expected."

Judge, let me turn quickly to the other two alleged misrepresentations. Many of the arguments that I just made apply with the same force to these other alleged misrepresentations. So I want to be telescoped, and I will try to just point out what's unique to -- arguments that are unique to each of these other alleged misrepresentations.

Alleged misrepresentation number two. Target portfolios sent to the rating agencies were false.

My first point is FGIC never saw these. FGIC never saw these target portfolios. I don't know how it could have relied on them. It claims it was committed to Pyxis on September 6. The rating agencies didn't issue their ratings until after that date. FGIC, therefore, could not have relied on those ratings.

FGIC's briefs make reference to a presale report prepared by Fitch, one of the three rating agencies that reflects that the deal was expected to have 10 percent prime. There is no evidence that any FGIC witness ever received or

reviewed this report. No one has testified to that effect whatsoever.

FGIC claims: Well maybe we didn't rely on the actual rating agency portfolios, we didn't see those; but we relied on the ratings that were issued as a consequence of the rating agencies getting those target portfolios. And, by the way, an attachment point, an initial AAA attachment point of 20.43 percent was a condition of the deal.

Well, what do they cite as the evidence that a 20.43 initial AAA attachment point was a condition of the deal? They cite a document called the securities purchase agreement between Calyon and Pyxis. That document was executed on October 3 a month before FGIC says it was committed to the deal. So it didn't rely upon that either.

Let me address the rating confirmation letters because I think this puts the stake in the heart of this particular argument. The suggestion is that if only the rating agencies had received the final portfolio they would have changed the initial AAA attachment point. And that's relevant, they're building a house of cards, because if the initial AAA attachment point was slightly higher we would have insisted that FGIC attach at an even higher level.

That's all debatable, your Honor. But the predicate for that is false because we know the rating agencies did receive the final portfolio. And the rating agencies, after

receipt of the final portfolio, each one of them separately confirmed their ratings for the deal for each of the note classes including the initial AAA attachment point of 20.43.

And I've attached each of the rating agency letters as Exhibits 42 through 44, behind that tab. And I've highlighted the relevant language. There is no dispute that the rating agencies are represented, that they are confirming their preexisting ratings based on the final portfolio sent to them that had been audited and circulated by the trustee.

So what's FGIC's response to this? The response is to say in an expert declaration, belatedly submitted in an opposition brief to summary judgment, that the rating agencies, each of them, has lied. That's their sole defense. And that's why they're pushed, your Honor, to saying something so, frankly, irresponsibly baseless.

What's the evidence that the rating agencies lied? FGIC never subpoenaed any of the rating agencies. They never deposed any of the rating agencies. They never asked any of the fact witnesses any questions about the rating agencies. There were no questions about the rating agencies' portfolios or questions about the confirmation letters. There was no such questions.

And by the way, if -- if the -- the suggestion is, hey, Putnam, you had a duty to correct these target portfolios that had been sent by Calyon to the rating agencies but you,

Putnam, we're going to put on you a duty to correct them. Putnam corrected them. It sent the final portfolios to each of the rating agencies who confirmed their ratings. That puts the stake in this argument.

Let me address Mr. O'Driscoll briefly. He's FGIC's expert. He's the author of the expert declaration submitted in connection with their opposition memo. I would submit his expert declaration is incompetent, baseless and untimely. And if I could just focus on something that counsel said earlier. We have -- Putnam absolutely disputes Mr. O'Driscoll's suggestion that by running the rating agencies' methodology you would derive a slightly higher initial AAA attachment point. Of course we dispute that.

Here's what happened in this case, Judge, and I'll let the Court sort it out.

Mr. O'Driscoll put in a reply declaration in which he said that his -- his opinion about the initial AAA attachment point was based on his experience, his experience. FGIC produced no work papers in support of that claim. None.

They didn't do it during expert document disclosure. And they didn't do it before Mr. O'Driscoll was deposed.

I deposed Mr. O'Driscoll. So your opinion is based on your experience? No, no. I have work papers.

Well where are they? How come they weren't produced earlier?

His deposition took place on June 26. Expert discovery closed on June 30. Counsel for FGIC faults me and faults Putnam's counsel for not seeking a chance to redepose him with respect to documents and work papers that they failed to timely produce.

In any event, his opinion is totally speculative. Here is the basis for his opinion. He said if the rating agencies had the final portfolio they would have reached a higher AAA attachment point.

Well there are three rating agencies. Rating agency number one, Moody's. He didn't purport to run Moody's model; didn't provide any testimony about what Moody's model would be.

Rating agency number two, Fitch. He didn't run the Fitch model. He didn't purport to run the Fitch model.

Rating agency number three, S&P. I was able to run the S&P model but I lacked, according to his own testimony, the inputs necessary to run that model.

Your Honor, if we are at trial in this matter we absolutely will be showing that Mr. O'Driscoll did not run the proper, the proper model for S&P.

Assume for the sake of argument that each of the rating agencies did not run any of their models, they just reconfirmed their ratings. Isn't that the end of it, Judge? Isn't that the end of it?

Rating agencies have the right to rate tranches

however they see fit. We know they received the final portfolio. They confirmed their ratings. That should be the end of it. The suggestion that the rating agencies lied because we're going to pick through some statement in an SEC report which, by the way, in and of itself says nothing of the rating agencies routinely lied in connection with the preparation of confirmation letters. That's not what the SEC report says.

The suggestion that FGIC would have attached at a 50 percent attachment point if only the AAA attachment point had been 25. Not a single FGIC witness testified to that. If you review their 56.1 statement, there's not a single FGIC witness who said that at any point. And in 2006 alone FGIC ensured tranches in at least three other CDOs at their initial AAA attachment point. Not at two times that amount.

FGIC points out: Well, the Ischus deal, which was similar in structure to the Pyxis deal, they attached at two times the amount. OK. Well, there were three other incidents of CDOs backed by lower-rated subprime RMBS of various vintages where they did not.

The last alleged misrepresentation, Judge. Putnam would select a Pyxis portfolio based on its own judgment or what FGIC's counsel refers to as the portfolio content misrepresentation.

I should note at the outset that this alleged

misrepresentation, and I invite the Court to read their briefs, it's totally amorphous as to what the actual misrepresentation is. Who said what to whom when?

Judge, I don't know. It appears to be a couple of things. One, FGIC appears to be saying well in our -- in the offering memo there is a representation or there is a statement at some point that FGIC -- I'm sorry, Putnam will select the collateral based on their own judgment, based on their own research and judgment. And they say well you didn't do that. And here is the evidence that we have that you, Putnam, you picked collateral assets that you didn't like, that weren't based on your judgment.

One, there were 153 assets in this deal. Twelve of them were CDOs. So it was a CDO that in part held positions in twelve other CDOs. Four of those twelve CDOs were other Magnetar deals. And they said it can't be the case that you would have picked other Magnetar CDOs for this Magnetar CDO absent Magnetar telling you to do that.

That's pure speculation, your Honor. There is no evidence that Magnetar told Putnam to include these four assets in the collateral pool of 153.

And I would note FGIC insured tranches in other CDOs at the same time as Pyxis that had great exposure to Magnetar CDOs than Pyxis. There's nothing unusual about this amount of Magnetar CDOs. It constituted a whopping total of 3.6 percent

of the final pool. That's the first piece of evidence.

The second is: Well, we think you put in exposure to the ABX index and we don't think you like those assets.

So, your Honor, in the sleeve of this binder I added two exhibits. The first is an e-mail exchange that counsel for FGIC referenced which the argument was you didn't like 10 of the 20 assets in a particular ABX series and that proves that you didn't like that asset, Putnam.

Well, here's what Carl Bell actually says in the e-mail. He writes, "We need to fine tune, but our guess is we'd like about 10 of the 20 bonds in one of these ABX indices on a held-to-maturity basis so the ABX could be used. One, a cheaper way to source some of the bonds that we like."

Judge, it's not our role to second guess Mr. Bell about whether this was a good investment for the deal or a bad investment for the deal. The question is: Did he personally think that this was a good investment? And he writes here, "This is a cheaper way to source some of the bonds that we like." There is no basis to argue or to infer from this document that Mr. Bell did not like these assets.

As it relates to the ABX. I don't want to confuse matters. The whole notion that FGIC was surprised by the amount of ABX in the deal sort of strikes us as fairly odd. Counsel made reference to the fact that FGIC received a ramp portfolio on July 18. That ramp portfolio at that point in

time reflected about two-thirds of the final assets that would be in the deal, about a billion dollars worth. Of that billion dollars, 75 million consisted of ABX securities; 176 consisted of ABX constituent securities.

Putnam didn't hide from anyone that it liked these assets or that it was putting them in the deal. And FGIC never complained.

Which brings me to the other e-mail identified by counsel where Putnam purportedly put an asset in the deal that it didn't like. And it's a single page, your Honor, with two sides.

At one point John Van Tassel, the author of the e-mail, is having an e-mail exchange with James Prusko, the equity sponsor of Pyxis at Magnetar and he writes, he writes, "Regarding ABX constituent securities. If it's in the warehouse, we indicated the notional amount." By that he means if we like the asset, we bought it, it's indicated in the notional amount. If you turn the page, your Honor, there are a number of assets, not highlighted, which have notional amounts next to them. That means that they've been acquired by Putnam for the deal.

"If we like it," he goes on to say, "and the spread is too tight, it's highlighted in blue." So then you see there are three ABX constituent securities highlighted in blue.

Mr. Van Tassel is saying: I like these but the spread

is too tight; in other words, the price isn't right; it's too expensive.

"And if we like it but we haven't tried to buy it yet, it's in orange." There are roughly nine or ten of those assets.

And then he writes, "All others we don't like." So those would be -- the "all others we don't like" would be the ones that are not highlighted that have a zero notional amount next to them. And there are about 13 of those.

Here's how many of the assets that Putnam, Mr. Van Tassel, didn't like that they acquired for the deal. Zero. Zero.

The ones that he didn't like, they didn't buy any.

Here's what they did. In order to juice the returns, to show that they didn't like those assets, there were three of them that Putnam arranged for the deal to short. So normally Putnam bought assets for Pyxis. They went long those assets. With respect to three assets that Mr. Van Tassel particularly did not like, they shorted those assets.

Again, the question is not whether he was right or wrong. The question is: Was he trying to put assets that he didn't like in the deal? This document can't be read any way other than he put assets in the deal that he liked.

Undisclosed portfolio constraints. FGIC's argument is you put assets in the deal or you selected assets according to

undisclosed portfolio constraints. You were hiding the absence of prime. You were hiding the absence of 2005H1 assets. You were hiding the percentage of assets that would be rated above Baa2. Nonsense.

Just a couple of quick points, your Honor. Their own credit application. This is the credit application that FGIC took and went to its credit application saying we want to do this deal. What did they highlight?

One, a WARF of five hundred; a targeted WARF of five hundred. That means a Weighted Average Rating Factor. A WARF of five hundred correlates to an overall aggregate rating between Baa2 and Baa3.

A weighted average spread of two hundred. That was the target. That's consistent with newer issuances. At least 80 percent subprime and mid prime. And no minimum amounts of prime. They knew what they were signing up for. They recommended doing this deal. Their own words. It gives us access -- exposure to the subprime RMBS sector.

A few other quick points. FGIC was sophisticated. I don't want to get into a theoretical dispute with Putnam, more sophisticated, was FGIC more sophisticated. There's an assertion, which I don't believe is based on any evidence, that Putnam had more sophisticated models. I don't know what the evidence is of that in the record.

FGIC was sophisticated. It insured tranches in 18

CDOs, many of them backed by subprime with a rating between Baa2 and Baa3. Those 18 deals had a notional exposure of in excess of $11 billion.

In addition, it insured 250 RMBS for a total notional exposure of 31 billion. Many of them were subprime RMBS. This was not their first rodeo.

They have sophisticated underwriting and surveillance capabilities. They told the board that they had the ability to model the cash flows to analyze the default rates. They had a sophisticated surveillance structure in place to monitor each closed transaction on an ongoing basis. They told the board that and they had that function. Whether they used it or not is on them. It's not on Putnam.

And lastly, before I turn it over to Mr. Murphy on damages, their credit application. They had the ability to look at, at that point in time, up to 98 acquired assets, close to 75 percent of the final portfolio. And there was statement after statement in that credit application. We didn't hear anything about this during argument. Statement that Putnam had selected a strong and diverse mixture of collateral assets. FGIC's conclusion was: No adverse selection. The portfolio was not concentrated in what FGIC would perceive as weaker issuers, originators or servicers. The quality of issuers, originators and servicers was represented at the market. Strong mixture. Quality appears to be comparable to our own

subprime book. Top subprime originators, issuers and servicers in the portfolio. Does not exhibit any adverse selection. And they recommended approval on the expressed basis that the deal would allow FGIC to take exposure to the subprime RMBS sector.

Your Honor, if you have no questions, I'll turn it over to Mr. Murphy.

MR. MURPHY: Good afternoon, your Honor.

Sean Murphy for defendant and I'm going to very briefly deal with damages and loss causation which start at slide 25 in the dec my colleague has already handed up.

I would submit, your Honor, that the issues of loss causation and damages are very well suited issues for summary judgment because FGIC and Putnam don't really disagree over the damages that FGIC is seeking. It's really just an issue of law as to whether legally they're entitled to those damages because FGIC wants to recover all of their damages. They handed up a dec. Slide 28: FGIC is entitled to recover all of its losses. They want every penny back they ever lost and the issue is whether the law allows that. And the law is a good place to start.

Slide 25, your Honor. Damages for New York cases that the measure is out-of-pocket losses which requires proof of an actual pecuniary loss sustained as a direct result of the alleged misrepresentation.

And loss causation, same concept, your Honor. Not

terribly unusual. The plaintiff has to distinguish between losses attributable to the fraud on the one hand versus market-wide forces. And that's obviously very relevant here given this was a subprime deal in the middle of a subprime crisis.

FGIC fails to meet its burden on both of these elements. In fact, FGIC doesn't really ever try, your Honor. As I've just pointed out on slide 28, they keep saying they're entitled to all of their losses. They want every penny they lost in the deal back. They never say well this loss was attributable to the misrepresentation and this was attributable to market. They spend all their time relying on arcane theories that say they should get all their losses back.

If you look at slide 26, your Honor, I think to understand what damages might flow from FGIC's losses you first have to understand their losses, what was the money that they actually paid out under the swap. Again, these are not damages. These are just losses.

The only money that FGIC ever paid out under this swap was a hundred million dollar payment in July 2009 to Calyon to settle their exposure in Pyxis and two other CDOs. That was the only money they ever paid. They never paid a penny more than that. Period. Full stop. That's the absolute universe of losses for which we have to determine how much of that was attributable to any alleged misrepresentations.

FGIC, it handed up a dec, your Honor, and at page or slide 27 of their dec they say FGIC's losses under the Pyxis guaranty were 782 million. FGIC's losses under the Pyxis guaranty were 782 million. That's the most misleading title I've ever seen. If you read carefully underneath it they say the losses were 782 because that's what FGIC would have had to pay had they not settled their exposure seven years early before it was due. The swap didn't require them to pay a penny until September 2016, long before those losses were occurred or incurred. They settled it for a fraction of what their exposure would have been.

It makes no sense to talk about what your losses hypothetically would have been had you not commuted your exposure. It's like bringing a securities fraud suit and saying well I lost a lot of money in the stock. Fortunately, I sold it before they occurred but, you know, we shouldn't talk about the losses that occurred after I mitigated. It makes no sense. Their losses, not their damages, their total losses were a hundred million dollars.

So, how would you prove loss causation or damages, your Honor, when their out-of-pocket or total expenditures until the swap were a hundred million? It's very straightforward under the law. How much of that hundred million was attributable to the alleged misrepresentation, assuming you can prove liability. And FGIC doesn't really

attempt to do this. They submitted an expert report and they don't want to talk about how much that hundred million is attributable to anything Putnam did because nothing Putnam did caused any of the losses, your Honor. That's not really disputed.

Mr. Baldwin talked a lot about: Oh, prime, we thought there would be ten percent prime. Their expert calculated that prime would have hurt Pyxis's performance. The lack of prime actually helped FGIC, if at all.

If you look a lot slide 28 your Honor, they have now in their opposition brief they have no evidence of it, but they've submitted in their brief that they can prove how much of the hundred million was attributable to the alleged misstatements and it's based on the single theory that FGIC would have attached at 50 percent. And you heard Mr. Baldwin and Mr. Arena talk about that. They suggest if they had attached at 50 percent they would have had lower loss reserves and then they would have negotiated a different settlement with Calyon.

This theory is what's known as an alternative contractual bargain under New York law. Again, I don't think FGIC disputes that. It's simply how does the law treat that alternative transaction. And New York Courts routinely reject alternative transactions as speculative.

And Mr. Baldwin argues that the transaction here is

not speculative because there's a rare exception when there's a concrete offer on the table. And I will concede New York law says there's a rare exception when you have a concrete contractual bargain on the table that you could have done, that has been recognized as a potential source of damages.

But that's not the case here, your Honor. And if you look at slide 29, FGIC's theory of -- it's far more speculative than those rejected by New York Courts. In fact, there are two independent alternative bargains here, both of which are highly speculative; the first being would they attach at 50 percent, which requires a lot of speculation as to whether Calyon would have agreed to that; and the second alternative transaction is that that in turn would have led to a different negotiation of a lower commutation payment with Calyon. And that is clearly speculative, your Honor. And we know that because Calyon or FGIC submitted a declaration with their opposition brief by Mr. Donnelly, who was the lead negotiator of the commutation payment. And he said: If we had made lower demands to Calyon, we don't know they would have responded to it, he calls it an unanswerable counterfactual.

So we know there is no concrete offer on the table not to attach at 50 percent and not to settle at an amount less than a hundred million. These are the exact types of alternative transactions courts have rejected as speculative.

Now, FGIC has two arguments as to why they're entitled

to all their damages. The first, which I have on slide 30, your Honor, is the collateral source rule. That rule has absolutely no application here. The collateral source rule is -- historically it's been used in personal injury cases and medical malpractice cases where an insurance company covers some of the plaintiff's medical expenses. It's never been used in a New York fraud case. It's been severely restricted over the last couple decades by the New York Courts and in fact partially abolished by the legislature.

But even if it could apply in this case, it just -- it has no application on these facts. The only third party source that could have even conceivably have covered some of the FGIC's losses -- and I would submit there was no third party that covered any of their losses -- but if you want to consider Calyon's settlement a collateral source, the law says Calyon can't be the collateral source. Again, we cite cases in our briefs that the source has to be wholly independent of the transaction and the defendant and clearly Calyon is not. I would cite the In Re Emergency Beacon case cited in our brief for that, your Honor.

What happened here is not a collateral source covering FGIC's losses. FGIC mitigated its losses. That's it. When a plaintiff sells out of his exposure and ends his exposure that's called mitigation, not collateral source. And there is no case that has taken anything close to the fact pattern here

and applied the collateral source rule.

Their other doctrine that they're relying on or other theory that they're relying on that they're entitled to all of their losses, your Honor, is irrevocability. They say because the guaranty was irrevocable they're entitled to all of their losses. And this is slide 31 in our dec, your Honor.

This fails for several reasons. First, the guaranty was revocable. They didn't hold it to the full term. They commuted the exposure seven years early, in July 2009. And secondly, the theory that irrevocability alleviates your burden of showing loss causation has been rejected three months ago by the New York Court of Appeals and very recently by the First Department in September, two months ago, expressly rejecting this theory.

I won't belabor it except to say irrevocability has never been held to entitle you to recover all your losses. Never. There are two cases talking about loss causation and irrevocability, Ambac and NBIA and they both reject it.

And the last point, your Honor, before I sit down, is slide 32. I would point that the Ambac case is directly on point for loss causation. You really don't need to look any further than this case to decide this issue. It couldn't be more on point. It involved a monoline insurer just like FGIC that issued an irrevocable financial guaranty that was required to prove loss causation by isolating only those loans in the

pool that were the results of losses from a misrepresentation.

And on slide 32, your Honor, we quote -- this is from FGIC's brief summarizing Ambac. They say, "The Court found that Ambac could not recover for losses on loans from which there was no misrepresentation because that would allow it to avoid its obligation to prove loss causation."

Exactly. We agree. You have to prove -- you have to be able only to recover losses on loans where there was a misrepresentation. And that's not what FGIC's doing.

Take the PCS. There is no dispute that 75 percent of the assets in the PCS were already purchased. They weren't misrepresented, your Honor. They were already in there. FGIC is saying they expected them to be in there. They want to recover the losses on those. That position is impossible to reconcile with Ambac.

I would just -- one other point on the hundred million, your Honor. There is a dispute -- there might be -- the one area where there is a dispute on is that FGIC is claiming that of the hundred million dollar payment to Calyon 74.5 million of that is attributable to Pyxis. Putnam greatly disputes that number. We think it's totally irrational because there were three CDOs covered by the hundred million dollar payment. They allocated 74.5 to Pyxis and zero to one of them. That had a 372 million dollar liability, potential liability attached to it. It would make no expense in the middle of a

financial crisis to settle that CDO for zero.

So we dispute that number. You don't need to decide that for purposes of our motion because even if you assume it's 74.5 you still have to come up with a theory to say how much of that 74.5 is attributable to a misrepresentation. FGIC doesn't even try.

I would leave you with that one point, your Honor. It's really undisputed that Putnam was not the cause of Pyxis's failure. You can't dispute that. Their own expert says that. Yet, plaintiff wants to recover all of their losses. And that is going in the absolute opposite direction of all the cases post-Dura and all the cases, recent cases in New York on damages. It's just totally inconsistent with the law.

Thank you, your Honor.

THE COURT: Thank you all very much. Most useful. Grateful. I'd like to decide this from the bench right now but somehow or other I feel that might be inappropriate so I will reserve decision. Thank you all.

(Adjourned)